
IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

— oO —

DAVIDSON & ASSOCIATES, INC.,
D.B.A. BLIZZARD ENTERTAINMENT,
AND VIVENDI UNIVERSAL GAMES, INC.,

Plaintiffs-Appellees,

—against—

INTERNET GATEWAY, INC.,
TIM JUNG, ROSS COMBS
AND ROB CRITTENDEN,

Defendants-Appellants.

**MOTION OF CONSUMERS UNION AND PUBLIC KNOWLEDGE FOR
LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF
INTERNET GATEWAY, INC., TIM JUNG, ROSS COMBS AND ROB
CRITTENDEN, AND BRIEF OF *AMICI CURIAE* CONSUMERS UNION AND
PUBLIC KNOWLEDGE IN SUPPORT OF INTERNET GATEWAY, INC., TIM
JUNG, ROSS COMBS AND ROB CRITTENDEN**

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Consumers Union and Public Knowledge respectfully move this Court, pursuant to Fed. R. Civ. P. 7(b), for leave to file the brief submitted herewith, as *amicus curiae* in support of Internet Gateway Inc., Tim Jung, Ross Combs and Rob Crittenden. Internet Gateway Inc., et al. (Bnetd) has consented to the filing of this brief. Consumers Union and Public Knowledge attempted to obtain consent to the filing of this brief from Davidson and Associates, Inc., et al. (“Blizzard”), but Blizzard has decided to withhold consent for more than two *amicus* briefs. Consumers Union and Public Knowledge requested consent after Blizzard had consented to two other *amicus* briefs; thus, Blizzard has withheld consent for this brief.

Consumers Union, publisher of *Consumer Reports* magazine, is a non-profit, independent testing and consumer protection organization serving only consumers. Public Knowledge is a nonprofit public interest organization that seeks to ensure that citizens have access to a robust public domain, an open Internet and flexible digital technology.

Amici’s interest in this case arises from their concern that Blizzard’s use of contract law and copyright law could result in a precedent that has severe negative repercussions on the consumer benefits—such as innovation, competitive prices, range of choices, and product interoperability—that result from the competition,

open marketplace, and consumer choice that are supported by the reverse engineering exception to intellectual property laws.

Amici believe that a friend-of-the-court brief in this matter may assist the Court in understanding the consumer interests at stake with regard to Blizzard's contract and DMCA claims. The brief principally addresses three topics. The first section describes the benefit of reverse engineering to consumers and explains why the Court should be particularly circumspect when reviewing shrink- and click-wrap contracts that limit the exercise of consumers' rights where the purpose of such rights is to confer a broader benefit on the public. The second section describes limits California law places on contracts similar to those at issue in this case and applies them here. The third section describes some of the risks to consumers of allowing Blizzard to stifle competition for its multi-player platform.

This brief meets the requirements of Rule 29. Judge Posner has suggested that an amicus is appropriate "when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *National Organization for Women, Inc. v. Scheidler*, 233 F.3d 615, 617 (7th Cir. 2000) citing *Ryan v. Commodity Futures Trading Cmsn.*, 135 F.3d 1062 (7th Cir. 1997). As noted by the 3rd Circuit, "[e]ven when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Associates, P.A. v. Cmsr. Of Internal Revenue*, 293 F.3d 128 (3d Cir.

2002). Consumers Union and Public Knowledge uniquely represent the interest of consumers, an interest that is strongly implicated by the reliance in these proceedings on the presumed validity of provisions in click-wrap licenses that threaten public rights in copyright law. The implications of the findings here will stretch far beyond consumers of Blizzard games and even beyond consumers of electronics and software. Accordingly, Consumers Union and Public Knowledge together present “considerations of fact, law, or policy” that are not being presented by the parties. *National Organization for Women*, 233 F.3d at 617.

Professors Mulligan and Urban and Ms. Quilter, who drafted the amicus brief submitted herewith, are familiar with the issues implicated by this matter. Specifically, they have reviewed the public versions of the filings, the consent decree, and other relevant documents.

Wherefore Consumers Union and Public Knowledge respectfully move that this Court grant leave to file the brief of *amicus curiae* submitted herewith.

Dated: January 24, 2005.

Respectfully Submitted,

By: _____
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CERTIFICATE OF SERVICE

I, Debra Krauss, declare: I am a citizen of the United States and am employed in the County of Alameda, State of California. I am over the age of 18 years and am not a party to the within action. My business address is University of California at Berkeley School of Law (Boalt Hall), 344 North Addition (Boalt Hall), Berkeley, CA 94720-7200. I am personally familiar with the business practice of the Samuelson Law, Technology & Public Policy Clinic. On January 24, 2005, I served the following document(s):

**MOTION OF CONSUMERS UNION AND PUBLIC KNOWLEDGE FOR
LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF
INTERNET GATEWAY, INC., TIM JUNG, ROSS COMBS AND ROB CRITTENDEN,
AND BRIEF OF *AMICI CURIAE* CONSUMERS UNION
AND PUBLIC KNOWLEDGE IN SUPPORT OF INTERNET GATEWAY, INC., TIM
JUNG, ROSS COMBS AND ROB CRITTENDEN**

by placing a true copy thereof enclosed in a sealed envelope addressed to the following parties:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed at Berkeley, California.

Dated: January 24, 2005.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* Public Knowledge states that it too is a not-for-profit 501(c)(3) corporation. It has no parent corporation and issues no stock.

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INTEREST OF AMICI

Consumers Union (“CU”), publisher of *Consumer Reports* magazine, is a non-profit, independent testing and consumer protection organization serving only consumers. Public Knowledge (“PK”) is a nonprofit public interest organization that seeks to ensure that citizens have access to a robust public domain, an open Internet and flexible digital technology. Amici’s interest in this case arises from their concern that the lower court’s decision allowing Blizzard Entertainment’s use of contract law and copyright law to constrain competition could result in a precedent with two negative repercussions for consumers. First, consumers benefit from the reverse engineering exception in intellectual property law through innovation, competitive prices, increased range of choices, and product interoperability made possible by reverse engineering. Reverse engineering is a core component of a robust, competitive market for consumer software products in particular. Aside from the direct benefits to consumers, reverse engineering is an integral component of the public side of the balancing afforded by copyright law. The ability of companies to strip consumers of the right to reverse engineer through click- and shrink-wrap contracts is a grave concern to CU and PK.

Second, CU and PK believe that shrink- and click-wrap contracts must be subject to the same unconscionability and public policy analysis as other contracts. CU and PK believe that the lower court failed to adequately discern and consider the public rights at issue here. Important public benefits are being eroded by private contracts.

For these reasons CU and PK seek to explain the ramifications of the District Court's decision, and to persuade this Court to avoid the consumer harm it will surely produce, if upheld.

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SUMMARY

This case signifies an industry-wide problem with consequences that go far beyond whether purchasers of legal computer games will be able to play them on the computer network of their choice. Every day consumers sign away important public rights as they rip and click through one-sided, non-negotiated shrink- and click-wrap contracts. Written in small print and presented post-purchase, these contracts often include terms that undermine public policy as well as consumers' expectations. The most pernicious of these contract terms take away rights that, although exercised by individuals, are designed to protect the public at large. The contract terms forbidding reverse engineering and "matchmaking" at issue here impermissibly constrain such rights.

The benefits of reverse engineering flow to society in the form of robust competition and innovation exemplified in interoperable products, competitive alternatives, and add-ons to programs that supplement, fix errors, or tailor computer programs. Without the ability to observe, capture and analyze the operation of software—in other words, to reverse engineer—researchers, competitors, and innovators in related and peripheral markets would be stymied in their efforts to bring improved goods into the marketplace. In both the Copyright Act and the related Digital Millennium

Copyright Act (DMCA), Congress acted to ensure these public benefits and to preserve the right to engage in reverse engineering.

The prohibitions on matchmaking and reverse engineering found in this contract comprise nothing more than a covert attack on competition. By limiting the method in which purchasers can use their lawfully purchased games—insisting that they use Blizzard’s service to identify gaming partners and engage in matched play and purportedly disallowing reverse engineering—Blizzard is engaging in anticompetitive actions that harm consumers of multi-player platforms.

By accusing the defendants of piracy, Blizzard may have blinded the court below to the important public policies fostering and protecting market competition and reverse engineering. Under the lower court’s opinion, any licensor could supplant public policy favoring competition and innovation with a combination of technical protection measures and click-wrap contracts.

Fortunately, other courts have taken a broader, more comprehensive view, holding that the law protects consumers and competition from overreaching contracts that erode public policy. California law, upon which the lower court based its contract ruling, takes an aggressive stance against the use of adhesion contracts to eviscerate consumer rights designed to

protect the public. Similarly, recent courts faced with consumer product companies' efforts to inappropriately leverage the protections of the DMCA to control legal post-purchase activities of consumers—akin to Blizzard's efforts here—have roundly rejected them. This Court should follow suit and find the contract terms prohibiting matchmaking and reverse engineering to be unenforceable as against public policy. Further, this Court should find that the after-purchase choice of the consumers at issue here to design their own network on which to play their legally purchased games is protected under the doctrine of reverse engineering.

I. Shrink-wrap Licenses That Divest Consumers of Rights That Are Designed to Benefit the Public, Including the Rights to Engage in Reverse Engineering and Lawful Competition, Contravene Public Policy and Warrant Special Scrutiny.

Shrink- and click-wrap contracts that purport to take away statutory and Constitutionally-enshrined public rights undermine vital doctrines protecting consumer interests. Consumer rights to engage in activities (or to expect that others may engage in such activities on their behalf) such as reverse engineering, benchmarking, new uses of existing products, buying interoperable products—and a plethora of others—exist because the long-term public interest in innovation is fostered by respecting the intellectual property balance.

A. The Primary Goal of the Reverse Engineering Exception to Copyright Law is to Benefit the Public Through Increased Creativity, Innovation and Competition.

Beginning with the power given Congress in the United States Constitution, Art. I, section 8, cl. 8, intellectual property law has always represented a balance between rights for creators and inventors and public rights to speak, read, use lawfully-acquired products, and to further create and innovate. The benefits of intellectual property law, under United States and California law, inure to the public. Consumers Union and Public Knowledge believe, as all parties likely do, that consumers benefit from intellectual property grants to producers. *See, e.g., Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”). For this public benefit to accrue, however, intellectual property rights must not be abused—for instance, by misusing such rights to deny consumers access to interoperable goods and services. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 160-61 (1989) (describing benefits of interoperability).

At issue here are clauses which on their face attempt to restrict consumers’ use of competing products, and even more insidiously, attempt

to bar competition altogether by barring reverse engineering and consumer choice.¹ Anti-competition clauses that restrain consumer use of competing and substitute products effectively constitute lock-in agreements, disfavored in virtually every area of law.

Firms often attempt to leverage existing rights to control other markets, including markets in interoperable aftermarket products; courts have repeatedly stepped in to stop unscrupulous producers from using such tactics. For example, during the height of the AT&T telephone monopoly, consumers were only allowed to use expensive and bulky Bell-authorized

¹ The End User License Agreement (EULA) on the game granted the license subject to the following restrictions:

[Y]ou may not, in whole or in part, copy, photocopy, reproduce, translate, *reverse engineer*, derive source code, modify, disassemble, decompile, create derivative works based on the Program ... without the prior consent, in writing, of Blizzard.

Davidson & Assocs. v. Internet Gateway, 334 F. Supp. 2d 1164, 1170-71 (E.D. Mo. 2004) (emphasis added). The Terms of Use (TOU) on the Blizzard.net online service included these restrictions:

[Y]ou shall not be entitled to ... (ii) copy, photocopy, reproduce, translate, *reverse engineer*, modify, disassemble, or de-compile in whole or in part any Battle.net software; (iii) create derivative works based on Battle.net; (iv) *host or provide matchmaking services* for any Blizzard software programs or *emulate or redirect the communication protocols* used by Blizzard as part of Battle.net, *through protocol emulation*, tunneling, modifying, or *adding components to the Program, use of a utility program*, or any other technique now known or hereafter developed *for any purpose*, including, but not limited to, network play over the internet, network play utilizing commercial or non-commercial gaming networks, or as part of content aggregation networks....

Id. at 1171 (emphasis added).

telephones when making calls over Bell's telephone lines. *United States v. Western Elec. Co.*, 673 F. Supp. 525, 600-01 (D.D.C. 1987), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990). Since the Bell breakup, the "cost of telephone instruments is down dramatically" and "competition has brought about innovations in telephone features." *Id.* (internal citations omitted). It was just these types of consumer harm and inefficiencies that led federal antitrust authorities and the Federal Communications Commission to initiate the Bell breakup. *See United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 195 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). There can be no question that enforcement of clauses that hinder competition, like the anti-matchmaking clause at issue here, are harmful to consumer interests and contrary to public policy.

Even more ultimately harmful to the public interest are the anti-reverse engineering clauses in Blizzard's End User License Agreement ("EULA") and Terms of Use ("TOU"). Reverse engineering has long been an important tool for protecting consumer interests within intellectual property law.² "The process of creation is often an incremental one, and

² Reverse engineering is a well-accepted and legally favored practice with wide-ranging applicability. *People v. Gopal*, 171 Cal. App. 3d 524, 533 (1985) ("reverse engineering is an accepted and lawful practice").

advances building on past developments are far more common than radical new concepts...When the nature of a work requires intermediate copying to understand the ideas and processes in a copyrighted work, that nature supports a fair use for intermediate copying. Thus, reverse engineering object code to discern the unprotectable ideas in a computer program is a fair use.” *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992). In the software industry, reverse engineering has produced a wide variety of interoperable products, competitive alternatives, and add-ons to programs that supplement, fix errors, or tailor programs to their owner. *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992) (reverse engineering used to make interoperable computer games); *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000) (reverse engineering used to create program to allow individuals to play Sony Play Station Games on their computers); *Atari*, 975 F.2d 832 (reverse engineering used to create interoperable games). Software developers employ reverse engineering techniques specific to software products, including observing software in operation, capturing the output and transmission streams produced by software, and running the program in conjunction with other programs or pieces of code in order to test interoperability, all of which are purportedly forbidden by Blizzard’s form contracts.

Further, the possibility of reverse engineering serves as an important, carefully-crafted limitation to the doctrines of trade secrecy and copyright. Innovators may choose among forms of intellectual property rights based on those carefully crafted balances. Innovators may select patent's strong rights, limited term, and disclosure to the public and competitors of the processes and ideas in the invention. Or, innovators may choose the much longer terms of copyright or trade secrecy, which permit the public and competitors to examine the products and uncover the processes or ideas through reverse engineering, with an eye toward developing competing products. Reverse engineering thus confers multiple benefits on society, fostering innovation and a competitive marketplace, and helps preserve the intellectual property balance.³

So important is reverse engineering to a competitive marketplace and consumers that Congress crafted a specific exemption to the DMCA to ensure it continued unimpeded. 17 U.S.C. § 1201(f). The purpose of the DMCA anti-circumvention provisions generally was to combat internet piracy and thus to encourage the growth of the digital content industry.

³ See Uniform Trade Secrets Act (UTSA) § 1, 14 U.L.A. 438, cmt. 2 (1990); Cal. Civ. Code § 3426.1(a) (Deering 2004); *Cadence Design Systems, Inc. v. Avant! Corp.*, 29 Cal. 4th 215, 222 (2002); 17 U.S.C. § 107; 17 U.S.C. 1201(f); 35 U.S.C. § 112 (disclosure requirements in patent law); Pamela Samuelson and Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 Yale L.J. 1575, 1583 (2002).

Universal City Studios, Inc. v. Corley, 273 F.3d 429, 435 (2d Cir. 2001). But Congress included § 1201(f) specifically to ensure that, while the anticircumvention provisions functioned to encourage the distribution of digital content, they were not used to stifle the development of competitive interoperable products, such as the independently copyrightable online gaming network created by Bnetd. The reverse engineering exception is critical in the context of the DMCA. Through it, the benefits of competition in the market for interoperable products flow to, and protect, consumers. *See* 144 Cong. Rec. E 2136 (daily ed. Oct. 13, 1998) (statement of Rep. Tom Bliley, Chairman of the House Commerce Committee).

B. The Lower Court Intertwined Its Copyright and Contract Analysis in a Manner that Limited Its Consideration of The Public Purpose and Benefit of Reverse Engineering.

In this case, Appellants, themselves consumers of Blizzard's games, sought to create a competing online platform that was free of the defects they saw in Battle.net so that they and others could use their lawfully-purchased games as they wished. *Davidson & Assocs. v. Internet Gateway*, 334 F. Supp. 2d 1164, 1171-72 (E.D. Mo. 2004). The Bnetd team did precisely what Congress sought to encourage—it engaged in reverse engineering and created an interoperable platform, expanding offerings for

consumers.⁴ Such innovation is perfectly congruent with the ultimate goals of intellectual property law, relies upon the public rights granted in those laws, and benefits the public.

Blizzard has attempted to stifle Bnetd, a competing service that interoperated with Blizzard's games as a "functional alternative" to Blizzard's online platform through the creative use of contract terms and the DMCA. Understandably, Blizzard would prefer to not have competition for its online Battle.net service. But a rule restricting consumers from using their software with another service, as the District Court allowed Blizzard to do, would enable vendors of any product to restrict consumers from using additional services, repairs, upgrades and add-ons. Use of licenses in

⁴ Bnetd provides a competitive, open source "functional alternative" to Battle.net, which was subject to complaints from game owners about customer cheating, network outage, and other features. *Davidson*, 334 F. Supp. 2d 1164, 1171. As an open source project, other developers are permitted to alter Bnetd's network code, to make additional improvements or customize it with additional or different features. Open source development is not the subject of this brief, but it is worth noting that open source projects have independently developed through reverse engineering many of the most secure and reliable competitive alternatives to popular programs, including the new Web browser, Firefox; the Web server, Apache; and the operating system, GNU/Linux. Open source products provide competitive alternatives to products by Microsoft, HP, and others; further, IBM, HP, and other technology companies see the benefits of open source as a development and distribution model and have endorsed the model. *See, e.g.*, Lucy Sherriff, IBM Pledges 500 Patents to OS Developers, *The Register*, Jan. 11, 2005 at http://www.theregister.co.uk/2005/01/11/ibm_patent_donation/.

conjunction with a DMCA-protected password to achieve this result is no more acceptable than use of either the password or the license alone. The DMCA “was not intended by Congress to be used to create a monopoly in the secondary markets for parts or components of products that consumers have already purchased.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 553 (6th Cir. 2004) (Feikens, J., concurring in part and dissenting in part).

The District Court blurred its breach of contract and DMCA analyses by equating “unauthorized access” with “copyright infringement,” thereby rendering the DMCA 1201(f) defense inapplicable. Yet as the Federal Circuit recently made clear, “access,” whether unauthorized or not, cannot constitute copyright infringement. *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1199 (Fed. Cir. 2004). The Court seems to have confused the alleged 1201(a) violation with the copyright infringement exception to the 1201(f) reverse engineering defense. *Davidson*, 334 F. Supp. 2d 1164, 1183. Statutory construction theory also reveals why this must be incorrect: were “access” to constitute copyright infringement, then the 1201(f) defense would be rendered entirely superfluous.

To develop the notion that “access” constituted “infringement,” the court relied on the EULA and TOU, which purported to bar both reverse

engineering and “matchmaking services” or emulators. Based on those restrictions, the court then defined access to the “Battle.net mode” as “unauthorized.”⁵ However, the “unauthorized” nature of the access does not change the picture with respect to copyright infringement. Without a finding of copyright infringement, the reverse engineering defense stands, and the finding of liability for impermissible circumvention fails.⁶

Other courts have found that consumers, through the act of purchase, are implicitly authorized to access and use, but not copy, software embedded in consumer products. *Id.* at 1203 (“The DMCA cannot allow Chamberlain to retract the most fundamental right that the Copyright Act grants consumers: the right to use the copy of Chamberlain’s embedded software that they purchased”). While the Federal Circuit in *Chamberlain* did not consider the effect of a one-sided click-wrap contract on implied authorization, it carefully analyzed the public policy reasons behind the balance in intellectual property laws. 381 F.3d at 1202, fn 17. As we discuss in Section II, numerous public policy doctrines protect consumers and forbid enforcement of license terms that would strip away such rights.

⁵ The term “Battle.net mode” is not defined or even mentioned in the licenses. Amici do not believe that consumers could reasonably have inferred such an interpretation from the license language.

⁶ Without a finding of circumvention, the trafficking holding also fails. *Davidson*, 334 F. Supp. 2d at 1186.

Indeed, under the District Court’s analysis, producers could decimate public rights that protect consumers—such as rights to use competitors’ supplies or other interoperable products—through waiver by form contract. Fair use rights such as commentary and criticism would be no safer under the Court’s analysis.

Where, as here, the terms of the contract have far-reaching consequences for the marketplace and consumer rights, numerous consumer protection doctrines make clear that the interests of the broader public must be weighed along with the interests of the parties. To ensure that the public interests protected by copyright are maintained, courts must critically assess private contracts that abolish the limitations on copyright holders exclusive rights designed to maintain space for the innovation and creativity of others essential to the progress of the arts and sciences. Under California law, as discussed *infra*, courts have an obligation to protect private rights designed to produce public benefits when reviewing private contracts that were calculated to cast them aside.

II. Private Parties May Not Contract Away the Public’s Benefits Such as the Innovation and Competition at the Core of the Reverse Engineering Exception to Intellectual Property Law.

Where Congress has carefully delineated public policy balances, as in intellectual property law, it is critical that courts thoughtfully evaluate

private-party alterations to those balances with an eye to relevant public policy defenses. Numerous doctrines provide protection for individual consumers in particular transactions and for the greater public interest. The District Court failed to consider these public interest doctrines, which are particularly important in this case, where there are (a) such limited procedural protections as available in a shrinkwrap contract; (b) significant public policy interests; and (c) where the benefit of the rights purportedly waived flow to society at large.

These public policy considerations would be significant in any contract case, but the limited procedural protections in the shrink-wrap and click-wrap context render them especially critical here. The unbargained-for, take-it-or-leave-it nature of these contracts eradicates consumers' ability to protect themselves through negotiation. The informal environment and manner in which consumers come in contact with these contracts, and the difficulty of gaining access to the terms on an ongoing basis, renders starkly thin any suggestion of "meeting of the minds," or even "notice." Consumers Union and Public Knowledge agree that mass market form contracts can have value in expediting the dissemination of consumer goods. But the illusory appearance of formalities such as "notice," "consent," and "meeting of the minds," should not blind the court to the realities of click- and shrink-

wrap licensing. Especially in contracts such as these, one-sided provisions that are “accepted” without understanding⁷ must receive close examination for their effects not just on the individual consumer’s rights, but on the downstream effects to third parties, competitive markets, and the public good.⁸ Numerous public policy levers permit courts to carefully evaluate enforcement of such clauses.

A. The Blizzard EULA Terms Prohibiting Reverse Engineering and Matchmaking are Unconscionable Under California Law.

Amici note that Appellants have argued that the terms of the EULA and TOU are preempted by the Copyright Act. *See* Opening Brief Of Defendants-Appellants at 40. We support this reasoning. In the alternative, however, California contract law governs, according to the District Court. *Davidson*, 334 F. Supp. 2d at 1175-76.

California law effectively holds all contracts of adhesion to be procedurally unconscionable. A contract or contract provision must also be

⁷ These consumers are without doubt unusual in their programming skills and their intense desire for a high-functioning way to play their games with others, but applicable contract and copyright law protects creative, computer-literate consumers just as it does other consumers.

⁸ *ProCD*, the leading case on shrinkwrap licenses, held that such licenses “are enforceable unless their terms are objectionable on grounds applicable to contracts generally.” *ProCD v. Zeidenberg*, 83 F.3d 1447, 1448 (7th Cir. 1996). Review of the substance of the clauses, and balancing of the substantive clauses and those procedural protections which are present, is not contrary to *ProCD*.

substantively unconscionable to be void under California law. The public policy implications of the provisions must be considered in the determination as to substantive unconscionability. California courts recognize a “sliding scale” where, for example, extraordinarily shocking substantive terms will require less in the way of procedural unconscionability and vice versa. *Ilkhchooyi v. Best*, 37 Cal. App. 4th 395, 410 (Ct. App. 1995). California Civil Code § 1670.5 provides that a court may refuse to enforce an unconscionable contract, it may enforce the remainder of the contract without the unconscionable clause, or it may limit the application of any unconscionable clause so as to avoid any unconscionable result. The court below failed to analyze adequately either prong of the unconscionability test.

1. Procedural Unconscionability

First, the EULA and TOU are clearly procedurally unconscionable under California law, whether they are viewed as contracts of adhesion or through the more traditional lens of oppression. “[A] contract of adhesion, *i.e.*, a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it” is necessarily procedurally unconscionable. *Ting v. AT & T*, 319 F.3d 1126, 1148 (9th Cir. 2002);

Martinez v. Master Protection Corp., 118 Cal. App. 4th 107, 114 (Ct. App. 2004). Such a conclusion squares with traditional procedural unconscionability, which in California, is established by either oppression or surprise. Oppression "spring[s] 'from an inequality of bargaining power [that] results in no real negotiation and an absence of meaningful choice.'" *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101 (9th Cir. 2003) (citing *Stirlen v. Supercuts*, 51 Cal. App. 4th 1519, 1532 (Ct. App. 1997)).

The licenses at issue in this case fall directly within the definition of oppression. As noted by the District Court, a significant disparity in bargaining power exists between Blizzard and its customers. *Davidson*, 334 F. Supp. 2d at 1179. Blizzard presents its customers with no opportunity for negotiation, nor any meaningful choice in regard to their use of Blizzard's software. As such, the EULA and TOU fall within California law's definition of oppressive contracts.

Because the defendants could purchase alternative software and return Blizzard's games if they chose not to accept the license, the District Court held that defendants failed to establish procedural unconscionability. *Davidson*, 334 F. Supp. 2d at 1179. Yet such an unreasonably literal understanding of *choice* undermines unconscionability doctrine. At a minimum, every private two-party negotiation presents two options: take it

or leave it. If the presence of these two “choices” secured against a finding of unconscionability, few parties, under any set of facts, could prove a contract term unconscionable. “A meaningful opportunity to negotiate or reject the terms of a contract must mean something more than an empty choice.” *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1106 (9th Cir. 2003). In light of the necessity of a more robust notion of meaningful choice, courts applying California law have cast serious doubt on the relevance of the availability of competing products and services in determining procedural unconscionability. *Ting*, 319 F.3d at 1149.

2. Substantive Unconscionability

California courts typically look to the one-sided nature of contract terms in determining substantive unconscionability rather than insisting on the more rigorous and vague “shock the conscience” standard employed by the court. *See Ting*, 319 F.3d at 1149; *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1071 (2003); *Ilkhchooyi*, 37 Cal. App. 4th at 410; *Jaramillo v. JH Real Estate Partners, Inc.*, 111 Cal. App. 4th 394, 400 (Ct. App. 2003); *Martinez*, 118 Cal. App. 4th at 113.

Pardee, the California case relied upon by the court in its discussion of substantive unconscionability, enumerates several standards for substantive unconscionability, and unlike the District Court, did *not* apply

the “shock the conscience” test. *Pardee Constr. Co. v. Superior Court of San Diego County*, 100 Cal. App. 4th 1081, 1090 (Ct. App. 2002). As the *Pardee* court explained, terms that produce “‘overly harsh’ or ‘one-sided’ results” are substantively unconscionable, as are those that “impose harsh or oppressive terms” and those introduced “only for [the more powerful party’s] benefit.” *Id.* at 1088-91.

In its analysis, the *Pardee* court followed consistent California caselaw holding that unconscionability is determined on the basis of a sliding scale: a greater degree of procedural unconscionability lessens the amount of substantive unconscionability necessary to invalidate a contractual provision, and vice versa. *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1046 (9th Cir. 2001); *O’Hare v. Mun. Res. Consultants*, 107 Cal. App. 4th 267, 283 (Ct. App. 2003); *Ilkhchooyi v. Best*, 37 Cal. App. 4th 395, 410 (Ct. App. 1995); *Samura v. Kaiser Found. Health Plan*, 17 Cal. App. 4th 1284, 1296 (Ct. App. 1993). The binary nature of a “shock the conscience standard” cannot comport with the sliding scale unconscionability analysis mandated by California precedent.

In analyzing substantive unconscionability, California courts have shown particular sensitivity to one-sided contracts involving the forfeiture of valuable rights protected by statute and founded in sound public policy. *See*

Ting, 319 F.3d at 1150; *Comb v. Paypal*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002). In particular, courts have examined the motivations for such clauses: if they are one-sided and placed in a contract for no purpose other than an unfair advantage to the more powerful party, then they are substantively unconscionable and unenforceable. *Soltani*, 258 F.3d at 1046. In this case, the Blizzard EULA and TOU demand the waiver of important and well-established rights that benefit the public. In exchange for this waiver, consumers receive nothing more than access to a product they already lawfully purchased. Such an uneven exchange demands at the very least a careful substantive analysis.

Contract terms that alter statutory rights should be closely examined to ensure that they are consonant with the statutory balancing scheme. For instance, despite the opportunity for individualized bargaining in the employment context, clauses that substantially affect the rights of the parties, such as arbitration clauses, are disfavored. *Ting*, 319 F.3d at 1150; *Comb*, 218 F. Supp. 2d at 1173. The licenses imposed upon Blizzard customers, because they require the sacrifice of the licensee's rights to reverse engineer and develop and use competing interoperable platforms, are precisely the sort of "agreements" requiring the court's responsiveness,

particularly in light of the contracts' high degree of procedural unconscionability.

In cases such as this one, where the effect of enforcing the contract at issue reaches beyond the parties to the agreement, the court must carefully evaluate the elements of substantive unconscionability. Anyone who lawfully purchases a Blizzard game must click "I Agree" to the EULA; anyone who accesses Battle.net must click "I Agree" to the TOU. Because of this, enforcement of the reverse engineering and matchmaking clauses would preclude not only innovative and competitive behavior by Appellants, but also effectively ensures that no development of interoperable competitive services can occur, at all, without Blizzard's consent. Such a result would profoundly affect the marketplace for software products and services and disrupt the public policy objectives underlying intellectual property law in a manner not supported by careful analysis of contract law in California.

B. California Law Disfavors the Enforcement of Contract Terms That Purport to Effect a Waiver of Statutory Rights that Confer a Public Benefit Such as the Anti-Reverse Engineering and Matchmaking Terms.

The state of California has explicitly evidenced its concern for the public policy implications of contract laws: Cal. Civil Code § 3513 states that private agreements cannot contravene the public policy decisions embodied in our Constitution or statutes.⁹ Cal. Civil Code § 3513 states that “Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.” Contrary to the lower court’s brief analysis,¹⁰ California law requires thorough consideration of the public nature of a right waived in a private contract.

⁹ More general forms of such laws are common in many states. The whole of Chapter 8 of the Restatement 2d of Contracts is devoted to contracts that are void for public policy reasons.

¹⁰ The District Court concluded that, “The defendants in this case waived their ‘fair use’ right to reverse engineer by agreeing to the licensing agreement. Parties may waive their statutory rights under law in a contract. *See, e.g.*, The Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) (2004) (statute outlines minimum requirements for waiver of statutory right to sue under the ADEA). In this case, defendants gave up their fair use rights and must be bound by that waiver.” 334 F. Supp. 2d at 1181. But the court overlooked the fact that ADEA contains *eight* separate conditions that must be met before waiver of this right is allowed including a prohibition on such waiver without additional consideration (no waiver is allowed unless “the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled”) 29 USCS § 626(f)(2)(D); and “the individual is advised in writing to consult

When interpreting § 3513's "a law" Courts must consider the public policies embodied not only in California statutes, but also those within the U.S. Constitution and Federal statutes.¹¹ Additionally, California courts have explained that "A law has been established 'for a public reason' only if it has been enacted for the protection of the public generally, i.e., if its tendency is to promote the welfare of the general public rather than a small percentage of citizens." *Benane v. Int'l Harvester Co.*, 142 Cal. App. 2d Supp. 874 (Ct. App. 1956) (employee cannot waive Elections Code right to two hours' paid leave to accommodate voting).¹² Under this principle,

with an attorney prior to executing the agreement" USCS § 626(f)(2)(E). In the contract at issue defendants received nothing but the game they already paid for in return for the waiver of important public rights and were not advised to consult an attorney.

¹¹ California case law makes clear that "California law includes federal law." *People ex rel. Happell v. Sisco*, 23 Cal.2d 478, 491 (1943) [Federal law is "the supreme law of the land (U.S. Const., art. VI, § 2) to the same extent as though expressly written into every state law"]; 6A Corbin on Contracts, supra, § 1374, p. 7 ["Under our Constitution, national law is also the law of every separate State".] Thus, a violation of federal law is a violation of law for purposes of determining whether or not a contract is unenforceable as contrary to the public policy of California." *Kashani v. Tsann Kuen China Enter. Co.*, 118 Cal. App. 4th 531, 543 (2004). While no § 3513 cases yet turn on rights granted by the U.S. Constitution or Federal statutes, the plain text of § 3513 ("a law") gives no reason to distinguish between State and Federal Constitutions. *See People v. Ventura Refining Co.*, 204 Cal. 286, 295 (1928) ("party may waive the benefits specially conferred upon him by statute *or constitution*") (emphasis added).

¹² California courts have noted that "Some public benefit is, however, inherent in most legislation. The pertinent inquiry, therefore, is not whether the law has any public benefit, but whether that benefit is merely incidental

numerous contractual provisions purporting to waive statutory rights designed primarily to serve a public purpose have been invalidated. *Arntz Builders v. Superior Court*, 122 Cal. App. 4th 1195 (2004) (provision was void in construction contract between builder and County that waived the benefits of Cal. Code Civ. Proc. § 394, which provided for change of venue to a “neutral county” in action by County against non-resident); *Azteca Construction, Inc. v. ADR Consulting, Inc.*, 121 Cal. App. 4th 1156 (2004) (party to contract could not waive statutory rights to disqualify an arbitrator); *County of Riverside v. Superior Court*, 27 Cal. 4th 793 (2002) (Bill of Rights Act, like many other statutory schemes enacted for the protection of a class of employees, not subject to blanket waiver); *Fineberg v. Harney & Moore*, 207 Cal. App. 3d 1049 (1989) (waiver of the provisions of Business and Professions Code section 6146, which placed a limit on contingency fee agreements, by parties to such an agreement in a medical malpractice case, was void); *Covino v. Governing Board*, 76 Cal. App. 3d 314, 322 (Ct. App. 1977) (teacher’s right to probationary status may not be waived); *De*

to the legislation’s primary purpose.” *Bickel v. City of Piedmont*, 16 Cal. 4th 1040, 1049 (1997), *superseded by statute*, *See Riverwatch v. County of San Diego*, 76 Cal. App. 4th 1428, 1439 (*Bickel*’s holding that parties could waive benefit of Permit Streamlining Act reversed by statute, which now forbids waivers of PSA time limits except once by mutual written agreement for period of not more than 90 days). So, as recently as 1998, the California legislature reacted when a court wrongly held that the benefit of a law enacted for a public reason could be waived. *Id.*

Haviland v. Warner Bros. Pictures, 67 Cal. App. 2d 225, 234-236 (Ct. App. 1944) (statutory time limitation on personal service contracts “may not be contravened by private agreement”).

The contract terms at issue in this case required the Appellants to waive more than merely personal rights. As discussed above, the U.S. Constitution,¹³ Federal statutes,¹⁴ and California statutes¹⁵ promote reverse engineering for a public reason.¹⁶ The benefits of reverse engineering are guaranteed not merely for the incidental benefits to the individual, but for the primary benefit from greater innovation and competition that flows to the public generally.¹⁷ By requiring consumers to waive these rights, Blizzard has attempted to contravene by a private agreement the public policy of both the United States and the State of California. Under Cal. Civil Code § 3513, such contract terms are void.

¹³ Reverse engineering, as a form of fair use, is founded in limitations on Copyright law that are motivated by the First Amendment, and also is integral to the “Promotion of Progress” demanded by Article I § 8. cl. 8.

¹⁴ In among other places, Congress’s codification of fair use in the Copyright Act, 17 U.S.C. § 107, and in the Reverse Engineering Exception, 1201(f), to the DMCA.

¹⁵ California explicitly acknowledges of the value of reverse engineering in its trade secret law. Cal. Civ. Code § 3426.1(a). “There are various legitimate means, such as reverse engineering, by which a trade secret can be acquired and used.” *Cadence Design Systems, Inc. v. Avant! Corp.*, 29 Cal. 4th 215, 222 (2002).

¹⁶ See *supra*, Section II.

¹⁷ Samuelson, Scotchmer, *Law and Economics of Reverse Engineering*, 111 Yale L.J. 1575 (2002).

When a party attempts to impose terms on myriad consumers through a contract of adhesion¹⁸ that would waive the benefits legislators intended for the public, public policy suffers a death by a million cuts. In this instance, California law does not support such a result.

III. Blizzard Should Not Be Allowed to Stifle Legitimate Competition Through its Click-wrap Contracts.

Blizzard's anti-matchmaking and anti-reverse engineering provisions, if enforceable, would stifle competition in the market for interoperable network gaming platforms. These contract terms harm not only would-be entrepreneurs but the consumers that would benefit from a competitive market. In this case, the Appellants play two roles: they were consumers disgruntled with the flaws in the Battle.net platform; then, because of their software expertise, they became "accidental" competitors to Blizzard. Indeed, the concerns over the deficiencies of Blizzard's Battle.net that motivated Appellants to develop the Bnetd service are apparently widely-shared among game consumers. *See* Mark Asher, *Embattled BATTLE.NET – Blizzard Belatedly Beefs Up Bandwidth for Booming Diablo II Popularity*, Computer Gaming World, Oct. 1, 2000. Blizzard's latest online game,

¹⁸ The application of § 3513 is not restricted to unconscionable contracts and no investigation of the surrounding procedural architecture is required. That this is a case with procedural unconscionability only makes the harm to public policy more pernicious.

World of Warcraft, is suffering from similar deficiencies and similarly engendering consumer frustration. See Rob Fahey, *Blizzard hit by backlash over World of Warcraft server problems*, Jan. 19, 2005, available at http://www.gamesindustry.biz/content_page.php?aid=6345. It appears that the benefits consumers expect from vigorous competition have not developed in Blizzard's less-than-robust platform. But for the anticompetitive provisions in the EULA and TOU, Bnetd might be only the first entrant into what may become a healthy competitive market for such services, freeing consumers to choose among a variety of online network play offerings. As such, the consumer harm presented by this case is similar to that caused by traditional intellectual property misuse and monopolists' anticompetitive behavior.

Blizzard's use of the DMCA's anti-circumvention provisions—in concert with click-wrap licensing—is, like monopolists and intellectual property misusers before it, attempting to leverage an intellectual property right to gain control of a peripheral market. Though Blizzard does not directly charge for access to the Battle.net network, it obtains revenue from advertisements pushed to consumers through the network. *Davidson*, 334 F. Supp. 2d at 1172. If no other producer can compete to provide multi-player platforms, then Blizzard can take advantage of its captive customers as Bell

did with telephone users, *see Western Elec. Co.*, 673 F. Supp. at 600-01, or as software makers have done with buyers of their software. *See Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 793. Blizzard could, for example, choose to charge monopolist prices for network access. Certainly, as noted above, it seems that platform quality has suffered under Blizzard-only development and promulgation. Since all copyright claims have been dismissed in this case, Blizzard's claim now rests on the DMCA rather than on rights granted by copyright or patent, but it uses the law to effect the same harm proscribed by misuse doctrines in the copyright and patent contexts.

The District Court's dismissal of Appellants' copyright misuse defense as irrelevant to a "breach of contract" claim misconstrues the goals behind the misuse doctrines, which are intended precisely to police the border between intellectual property rights and other doctrines. To date, no appellate decision in this Circuit has considered copyright misuse, but it is a settled doctrine in other Circuits. *See Video Pipeline, Inc v. Buena Vista Home Entm't.*, 342 F.3d 191 (3rd Cir. 2003) (rejecting copyright misuse defense on facts, but noting that "Anticompetitive licensing agreements may conflict with the purpose behind a copyright's protection by depriving the public of the would-be competitor's creativity."); *see also Alcatel*, 166 F.3d

772 (5th Cir. 1999) (finding copyright misuse based on an overly restrictive licensing agreement that effectively gave the licensor control over uncopyrighted microprocessor cards); *Practice Mgmt. v. American Med. Ass'n*, 121 F.3d 516 (9th Cir. 1991) (finding copyright misuse based on a licensing agreement that required the administrative-agency licensee to use only the copyrighted billing codes licensed, and to use its regulatory powers to require only the licensor's codes); *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 976-79 (4th Cir. 1990) (finding copyright misuse where licensor attempted to control competition in areas not covered by copyright). While two District Court decisions in this Circuit construe copyright misuse as applying only when the antitrust laws are violated [*Antioch Co. v. Scrapbook Borders, Inc.*, 291 F. Supp. 2d 980, 1001 (2003); *Hutchinson Tel. Co. v. Frontier Directory Co.*, 4 U.S.P.Q.2D (BNA) 1968], this is not a commonly followed analysis—if so, it would render the misuse doctrine irrelevant, as antitrust would always apply. Generally speaking, copyright misuse exists when a copyright holder attempts to illegally extend the exclusive rights that he enjoys beyond what the copyright legally permits or otherwise violates the public policies underlying the copyright laws. *See In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1103 (N.D. Cal. 2002) (Patel, C.J.). Blizzard purportedly uses its EULA and TOU to keep

competitors from reverse engineering or matchmaking, anticompetitive purposes beyond the scope of its copyrights. As such, the present case, though based on the DMCA, presents public policies issues similar to those policed by, and invites a comparison with, the traditional misuse doctrines.

IV. Conclusion

For the reasons set forth above, Consumers Union and Public Knowledge respectfully request that this Court reverse the decision of the Eastern District of Missouri.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I certify that this brief complies with the type volume limitation. The brief, exclusive of exempted portions, contains 6,955 words and was prepared using Microsoft Office Word 2003.

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Local Rule 28A(d)(2), that the diskette containing the Brief *Amici Curiae* filed on behalf of Consumers Union and Public Knowledge has been scanned for viruses and that the disk and the files it contains are virus-free.

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